

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

RICHARD E. MAY,

Plaintiff,

v.

No.

GOVERNOR SUSANA MARTINEZ of the  
State of New Mexico,

And

SECRETARY TOM CLIFFORD, Department  
of Finance and Administration of New Mexico,

Defendants.

**COMPLAINT FOR INJUNCTIVE RELIEF,  
DECLARATORY RELIEF, WRIT OF MANDAMUS,  
DAMAGES, AND ATTORNEY'S FEES**

**Preliminary Statement**

1. This is an action under the New Mexico Inspection of Public Records Act, **NMSA 1978, §§ 14-2-1, et seq.**, (hereinafter "IPRA") brought by Richard E. May, former Chief Executive Officer of the New Mexico Finance Authority against Defendant Governor Susana Martinez and Defendant Secretary Tom Clifford, Department of Finance and Administration [hereinafter referred to as the "**DFA**"]. Plaintiff as the former Chief Executive Officer of the New Mexico Finance Authority has

substantial interest in the manner in which the executive department of the State of New Mexico was improperly involved in the oversight and administration of the New Mexico Finance Authority and the State of New Mexico's response and actions after being advised by the Plaintiff and other senior managers at the New Mexico Finance Authority that they had discovered that the audit for Fiscal Year 2011 was fraudulent, that the independent auditor Clifton Gunderson LLP had inexplicably abandoned the completion of the Fiscal Year 2011 audit, and that Clifton Gunderson LLP and State Auditor Hector Balderas had failed to timely advise Plaintiff that the Fiscal Year Audit for 2011 was not filed, and that the fraudulent audit was prepared by the former controller of the New Mexico Finance Authority.

2. Plaintiff Richard E. May also has a professional and personal concern and interest involving the fair and equitable treatment and/or administration of New Mexico Finance Authority officers and employees by the Board of the New Mexico Finance Authority and Defendant Governor Susana Martinez and the DFA under Defendant Secretary Tom Clifford who serves on the Board of the New Mexico Finance Authority.

3. The State of New Mexico, through the Office of Defendant Governor Susana Martinez and the DFA through Defendant Secretary Tom

Clifford have purposefully and intentionally delayed, failed, and refused to produce copies of properly requested public records as per proper IPRA requests of Plaintiff Richard E. May that were properly served on Defendants through their designated representatives on April 10, 2013. Defendants have unlawfully withheld public records and documents and have unreasonably delayed the production of responsive documents.

4. It has been 174 days since the Plaintiff's April 10, 2013 IPRA requests were served on the Defendants. Defendants have engaged in a continuing pattern and practice of violating the Inspection of Public Records Act and denying Plaintiff access to public records that may be embarrassing or show excess and abuses of the powers and authority of these Defendants.

5. Since the April 10, 2013 IPRA requests were served Defendant Governor Susana Martinez, through her designated representative Pamela Cason, has sent form e-correspondence stating that more time is needed to comply with the specific IPRA requests. Defendants have purposefully delayed the disclosure of public records and have purposefully, willfully, and intentionally refused to provide Plaintiff Richard E. May with properly requested public records.

6. Since the April 10, 2013 IPRA requests were served Defendant Secretary Tom Clifford, through his designated representative Tim Korte,

sent form emails and letters stating that more time was needed to comply with the specific IPRA requests, and then sent letters in June 2013 and July 2013 advising that several hundred pages of responsive records were identified as responsive to the IPRA request but which further stated that more time was required to go through the records. Thereafter Defendant Secretary Tom Clifford has failed to send any follow up letters or correspondence regarding the pending IPRA requests.

7. Defendants have exceeded any reasonable period of time for the disclosure of the requested public records and Defendants have purposefully, willfully and intentionally abused the provision of the IPRA which allows a respondent a reasonable period of time to disclose public records that it deems are the subject of a request that is excessively burdensome or broad. IPRA does not contain any open ended time for making disclosure simply because a State Official deems a request excessively burdensome or broad. IPRA does not create any right for a State Official to extend the time for disclosure beyond a reasonable time period. The burden is on the Defendants to create and maintain procedures and process so that IPRA requests are complied with in a timely and reasonable period of time. **NMSA 1978, {14-2-10.**

8. As a matter of transparency and good government, to comply with

the mandatory and statutory requirements of IPRA Defendants, responsible for the operation of State Government and Departments of State Government must have procedures in place to assure that pursuant to IPRA they can promptly locate and produce the requested public records in a timely manner and in a reasonable period of time.

9. It is an act of bad faith that violates IPRA, and the statutory rights of Plaintiff, for Defendants to use the ploy of deeming an IPRA request excessively burdensome and broad as an excuse to refuse to disclose public records. This case seeks to ensure Plaintiff Richard E. May access to public records necessary for the Plaintiff and public to have an understanding of the conduct of Defendants Governor Susana Martinez and Secretary Tom Clifford and other state officials regarding the events and operations pertaining to the New Mexico Finance Authority and other aspects of state government.

10. Notwithstanding, IPRA's clear statutory mandates and requirements, and Defendant Governor Susana Martinez' own pledges of transparency, Defendant Governor Susana Martinez and Defendant Secretary Tom Clifford failed to enact, create, or put in place a reasonable process to comply with IPRA, and as described in this Complaint, these Defendants, repeatedly violated Plaintiff's IPRA rights by delaying and

withholding the production of public records and documents that are responsive to the proper IPRA requests served by Plaintiff on April 10, 2013. Defendants have flaunted the clearly enunciated public policy purposes of IPRA.

11. The maintenance of the free flow of information to the public from the government, essential to the operation of democracy, is the public policy purpose behind New Mexico's very expansive Inspection of Public Records Act and of this lawsuit.

**NMSA 1978, {14-2-5. Purpose of act; declaration of public policy. (1993)}**

Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act [14-2-4 NMSA 1978] is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

**Parties, Jurisdiction and Venue**

12. Paragraphs 1 through 11 of this Complaint are incorporated herein by reference as if fully set forth.

13. Plaintiff Richard E. May is a resident of Santa Fe County, New Mexico.

14. Defendant Governor Susana Martinez is the Governor of the State of New Mexico and she is a resident of Santa Fe County, New Mexico. She is sued in her official capacity as the Chief Executive Officer of the State of New Mexico.

15. Defendant Tom Clifford is the duly appointed and acting Secretary of the New Mexico Department of Finance and Administration [DFA] and whose office is located in Santa Fe County, New Mexico. He is sued in his official capacity as the Secretary of DFA who is responsible to the Defendant Governor Susana Martinez for the operation of DFA and it is his duty to manage all operations of DFA and to administer and enforce the laws with which he or DFA are charged pursuant to **NMSA 1978, {9-6-5.**

16. The requirements of the New Mexico Inspection of Public Records Act apply to Defendant Governor Susana Martinez, Defendant Secretary Tom Clifford and to the State of New Mexico.

17. This Court has jurisdiction to enforce the Inspection of Public Records Act pursuant to **NMSA 1978, {{ 14-2-11 and 14-2-12.**

18. Venue is proper in Santa Fe County pursuant to **NMSA 1978, { 38-3-1.**

19. The declaratory relief prayed for in this action is authorized by **NMSA 1978, {{ 44-6-1 through 44-6-15 and by NMRA 1-057.**

20. This Court has the power and jurisdiction to issue a writ of mandamus, and/or to order a preliminary and permanent injunction, or other appropriate remedy to enforce the provisions of the IPRA pursuant to **NMSA 1978, {14-2-12 B.**

### **Statement of Facts**

21. Paragraphs 1 through 20 of this Complaint are incorporated herein by reference as if fully set forth.

22. There is a strong public policy throughout the United States and in New Mexico that has been enforced by the courts in favor of the disclosure of public records or the submission of proper justification for the non-disclosure of public records and the Defendants without cause or justification have breached their obligations and duties under IPRA.

23. On April 10, 2013 Plaintiff served a specific IPRA request on Defendant Governor Susana Martinez, carefully organized by categories of public records requested, through her designated representative. A copy of that duly served IPRA request is attached hereto as **Exhibit 1** and incorporated herein by reference as if fully set forth.

24. Defendant Governor Susana Martinez through her designated representative docketed that IPRA request as IPRA 13-016 and has repeatedly failed to provide any of the requested public records to Plaintiff.



The total substance of the form responses of Defendant Governor Susana Martinez dated April 15, 2013, April 25, 2013, May 23, 2013, June 28, 2013, July 26, 2013, August 23, 2013, and September 20, 2013, all of which are copied to one of Defendant Governor's Counsel, Matthew Stackpole, are attached hereto as **Exhibit 2** and incorporated herein by reference as if fully set forth.

25. On April 10, 2013 Plaintiff served a specific IPRA request on Defendant Secretary Tom Clifford, carefully organized by categories of public records requested, through his designated representative. A copy of that duly served IPRA request is attached hereto as **Exhibit 3** and incorporated herein by reference as if fully set forth.

26. Defendant Secretary Tom Clifford through his designated representative has repeatedly failed to provide any of the requested public records to Plaintiff. The form responses and other correspondence sent on behalf of Defendant Secretary Tom Clifford dated April 15, 2013, May 1, 2011, May 29, 2013, June 26, 2013, and July 23, 2013 are attached hereto as **Exhibit 4** and incorporated herein by reference as if fully set forth.

27. The responses on behalf of Defendant Secretary Tom Clifford dated June 26, 2013 and July 23, 2013 to the April 10, 2013 IPRA requests contained in **Exhibit 4** essentially stated that "several hundred pages" of

documents had been identified as being responsive and that confirmation of the responsiveness of these documents was to undergo legal review. On July 23, 2013 Plaintiff's counsel sent Defendant Secretary Tom Clifford's representative for IPRA correspondence stating that the continuing failure to provide any disclosures of properly requested public records pursuant to the April 10, 2013 IPRA requests was a continuing violation of IPRA. A copy of that July 23, 2013 correspondence sent to the designated representative of Defendant Secretary Clifford is attached hereto as **Exhibit 5** and incorporated herein by reference as if fully set forth.

28. After the July 23, 2013 correspondence from Plaintiff's counsel to Defendant Secretary Tom Clifford's designated IPRA representative there has been no further correspondence, communication, or contact from Defendant Secretary Tom Clifford of DFA regarding the April 10, 2013 IPRA requests for public records, **Exhibit 3**.

29. Thus, as of the date of the filing of this Complaint, Defendants have engaged in stalling tactics and they have still not provided Plaintiff the opportunity to inspect and copy any of the requested public records, as defined in **NMSA 1978, 14-2-6 G** and identified with particularity in paragraphs 22 and 24 of this Complaint. See **Exhibit 1** and **Exhibit 3**.

30. Defendants have never claimed or denied in any correspondence

or communications to Plaintiff that the records sought by the April 10, 2013 IPRA requests, Exhibit 1 and Exhibit 3, were not public records as that term is defined in **NMSA 1978, 14-2-6 G.**

31. Contrary to **NMSA 1978, {14-2-8 (D) and {14-2-10**, Defendants have not explained in writing when the records will be available for inspection or when the Defendants will respond substantively to the IPRA requests or why the requested records have not been produced for inspection except for the hollow claim that the IPRA request is excessively burdensome and broad and the June 26, 2013 and July 23, 2013 letters from Defendant Secretary Clifford that referenced a review of records.

32. The Defendants have failed to comply with the mandatory conditions and requirements of **NMSA 1978, {14-2-11** for compliance with IPRA.

### **Claims for Relief**

33. Paragraphs 1 through 32 of this Complaint are incorporated herein by reference as if fully set forth.

34. The documents requested by Plaintiff are public records required to be disclosed under the New Mexico Inspection of Public Records Act, **NMSA 1978, {{14-2-1 through 14-2-12** and no statutory exception to disclosure applies to these records of the Defendants and the State of New

Mexico.

35. The documents requested are within the definition of “public records” under **NMSA 1978 {14-2-6 (G)}**.

36. The written IPRA requests described in paragraphs 22 and 24, **See, Exhibit 1 and Exhibit 3**, of this Complaint identified the public records sought with reasonable particularity as required by **NMSA 1978, {14-2-8}**.

37. Defendants have unlawfully denied Plaintiff the right to promptly inspect public records in a reasonable period of time in violation of the requirement of the Inspection of Public Records Act that Defendants initially "permit inspection immediately upon receiving a written request, or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request." **NMSA 1978, {14-2-8(D)}** and they have unlawfully, willfully and intentionally used **NMSA 1978, {14-2-10}** as a stalling tactic and subterfuge to hide from public disclosure the public records sought in the April 10, 2013 IPRA requests, **Exhibit 1 and Exhibit 3** as particularly described in paragraphs 22 and 24 of this Complaint.

38. Defendants have purposefully, willfully, and intentionally, and in bad faith, attempted to use the provisions stated in **NMSA 1978, {14-2-10}** to withhold from disclosure the public records properly requested in the April 10, 2013 IPRA requests, **Exhibit 1 and Exhibit 3**.

39. Plaintiff Richard E. May has a strong interest in access to and governmental disclosure of public records and documents. Only by the maintenance of the free flow of information to the public from the government can the principles of democracy and accountability be maintained. Defendants' continued refusal to disclose the requested information prevents Plaintiff from researching and determining, inter alia:

A. Why for a Governor and Administration which claims to be the most transparent in New Mexico history, there is a lack of a timely and meaningful response to legitimate IPRA requests?

B. What is taking the Defendants so long in providing these requested documents with the information technology currently available?

C. Why do the Defendants need this additional time to release records and whether the repeated delays in producing public records are because the Defendants want to coordinate which records they will release to ensure they keep their story straight about the Finance Authority and the aftermath of the revelation of the fraudulent audit? Or, whether the Defendants have delayed releasing properly requested public records because damaging and embarrassing information is contained in the materials requested by the April 10, 2013 IPRA requests, **Exhibit 1** and **Exhibit 3**?

D. Whether all of the facts surrounding the fake audit situation at the Finance Authority would show that Defendants and the Governor's office and DFA played a significant role in creating and continuing a biased "investigative" process despite knowing, and/or having reason to know, the fact that the Finance Authority's independent auditor, Clifton Gunderson LLP, completely abandoned its professional responsibilities and obligations regarding the Fiscal Year 2011 audit of the New Mexico Finance Authority, and that led to unwarranted criminal charges against the New Mexico Finance Authority's former COO/CFO, that led to televised search warrants being executed, that led to the televised arrest of the COO/CFO, that led to

irresponsible and unfounded speculation that large amounts of money was missing at the Finance Authority, that led to the termination of Plaintiff from his employment as the Chief Executive Officer of the New Mexico Finance Authority, and that caused unnecessary and further harm to the reputations of the Finance Authority and its former senior management team, including Plaintiff, particularly since Clifton Gunderson LLP was primarily the blame since it abandoned its professional duties, obligations, and responsibilities in connection with the Fiscal Year 2011 audit?

E. Why instead of permitting a former federal prosecutor to investigate the actual circumstances regarding the fraudulent audit and how it happened, the Defendants through the service of Defendant Secretary Tom Clifford on the Board of the New Mexico Finance Authority and Defendant Governor Martinez' other appointees on the New Mexico Finance Authority essentially quashed the independent investigation and placed the State Auditor's office and an unqualified gubernatorial appointee in charge of an investigation regarding the fraudulent audit prepared by a singular employee of the New Mexico Finance Authority?

F. Whether the gubernatorial appointee, Daniel Tanaka, former Regulation and Licensing Securities Division Director, resigned because of his apparent inability to gain Senate confirmation due to substantial and legitimate concerns over how he conducted his portion of the investigation of the Finance Authority?

G. Whether there was any discussion or correspondence about the conflict of interest of New Mexico State Auditor Hector Balderas and his office's failings and defaults regarding the Fiscal Year 2011 audit of the New Mexico Finance Authority and whether that office and its agents were appropriate to have in any investigative role regarding the Fiscal Year 2011 audit?

H. Whether Defendants were aware of, were kept aware of, and/or participated in the so-called Special Audit conducted by the State Auditor's office which appears to have minimized the responsibility of a State Auditor approved external auditing firm and seems to have been an attempt to cover-up the State Auditor's and that external auditor's culpability and negligence in the matter and to shift the blame to others?

I. Whether there was any discussion or correspondence about the fact that the independent external auditing firm of Clifton Gunderson LLP, had never indicated to Plaintiff and/or the Finance Authority's senior management even once after December 15, 2011 and before March 12, 2012 (the date when documents were released to the public for a March 22, 2012 bond sale) that the Finance Authority Fiscal Year 2011 audit had not been completed and filed with the State Auditor and thus the fraudulent audit matter would have been discovered in a timely manner and reputations and personal harms would have been avoided?

40. The on-going violations of IPRA as set forth in this Complaint will continue unless this Court takes action to stop it. The denial of the inspection of these public records and documents has caused and will continue to cause Plaintiff Richard E. May, and the public at large, irreparable harm until halted by this Court.

41. There is no provision within the Inspection of Public Records Act that exempts the requested items in Paragraphs 22 and 24 of this Complaint from full disclosure and none has been identified by the Defendants. There is no provision within the Inspection of Public Records Act that exempts the requested items in Paragraphs 22 and 24 of this Complaint from full disclosure under the provisions of IPRA as specifically set out and requested in the April 10, 2013 IPRA requests served on Defendants, See, **Exhibit 1** and **Exhibit 3**.

42. The New Mexico Court of Appeals has ruled that email concerning public business is a public record that must be produced under

IPRA. The New Mexico Attorney General has further ruled that email about public business that is created and sent on a public employee's private email account is a public record that must be produced under IPRA.

43. Upon information and belief, Defendants have no policy or procedure concerning the search and production requirements that must be followed by those individuals who receive forwarded IPRA requests from designated IPRA custodians before the recipients are allowed to certify that they have no responsive documents.

44. Upon information and belief, Defendants do not conduct an adequate follow up to forwarded IPRA requests and responses to these requests from the designated custodians.

45. Upon information and belief, Defendants have no policy or procedure concerning any requirements for the maintenance and search of email accounts of individual who were working during the time period of an IPRA request but who no longer work at Defendants' offices, or are on vacation, or are otherwise unavailable to respond to a forwarded IPRA request.

46. Defendants' lack of adequate policies and procedures regarding the processing and review of forwarded IPRA requests and any documents submitted in response, as well as the absence of any maintenance and search



of email accounts belonging to present and/or absent individuals is unreasonable and unlawful and contributes to violations of IPRA.

47. Plaintiff is suffering and will continue to suffer immediate and irreparable harm unless this Court issues a preliminary and permanent injunction and/or Writ of Mandamus requiring Defendants to conduct a prompt and thorough search of their files and then promptly produce all public records and documents that are required to be produced in response to the particular IPRA requests, including but not limited to those public records and documents that are held in public and private email accounts and in the files of all current and former employees and agents of Defendants even if they were not at work when the April 10, 2013 IPRA requests were made.

48. Defendants have engaged in a pattern and practice of unreasonably delaying responding to Plaintiff's IPRA requests served April 10, 2013 as stated in paragraphs 22 and 24 of the Complaint and which are contained in **Exhibit 1** and **Exhibit 3**.

49. As a direct and proximate result of the conduct of the Defendants, Plaintiff suffered and continues to suffer the violation of his statutory rights.

50. Plaintiff has no adequate remedy at law.

51. **NMSA 1978, {14-2-12** authorizes Plaintiff to bring an action in

this Court to enforce the Inspection of Public Records Act and to seek appropriate remedies, including Declaratory, Mandamus, and Injunctive relief and statutory damages, punitive damages, and attorney's fees for the violations of the Inspection of Public Records Act complained of herein.

**Prayer for Relief**

**WHEREFORE**, Plaintiff Richard E. May prays as follows:

A. That the Court enter a declaratory judgment holding that Defendant Governor Susana Martinez and Defendant Secretary Tom Clifford, by the actions described herein, have violated the provisions of the Inspection of Public Records Act and unlawfully, knowingly and intentionally withheld public records from the Plaintiff;

B. That the Court enter a Preliminary and/or Permanent Injunction and/or a Writ of Mandamus requiring Defendant Governor Susana Martinez and Defendant Secretary Tom Clifford to immediately produce for inspection the requested public records and documents and permanently enjoin Defendants Governor Susana Martinez and Secretary Tom Clifford, and their employees and agents from failing to allow Plaintiff to inspect the requested records in accordance with IPRA.

C. That the Court award damages, statutory and/or punitive, for the violations of the Inspection of Public Records Act by Defendant Governor

Susana Martinez and Defendant Secretary Tom Clifford and agents acting on their behalf, as authorized by **NMSA 1978, {14-2-12**, in an amount to be determined by the trier of fact, plus pre- and post- judgment interest;

D. That the Court award Plaintiff reasonable attorney's fees and costs, pursuant to **NMSA 1978, {14-2-11 and/or {14-2-12**; and

F. That the Court Order such further relief as it deems just and proper;

RESPECTFULLY SUBMITTED,

/s/ Steven G. Farber

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ATTORNEY FOR PLAINTIFF  
RICHARD E. MAY

I hereby certify that Interrogatories and Requests for Production were served on the Defendants together with the Complaint and Summons in this case.

/s/ Steven G. Farber

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STEVEN G. FARBER